

# HOUSE BILL No. 1111

## DIGEST OF INTRODUCED BILL

**Citations Affected:** IC 5-14-3-4; IC 22-5-3-1; IC 22-16.

**Synopsis:** Employee access to personnel records. Provides that an employer, upon written request from an employee, shall allow the employee to review the employee's personnel records. Provides procedures if the employee disagrees with the recorded information. Prohibits an employer from gathering or retaining records of certain employee activities. Provides that an employer may keep a separate file when investigating certain criminal, destructive, or disruptive activities. Provides that a court may award damages to an employee if the employer violates any of these provisions, along with attorney's fees and court costs. Provides that information concerning findings of fact and decisions in which final action was taken and that resulted in the suspension without pay or discharge of a public employee is a public record.

**Effective:** July 1, 2003.

**Cheney**

January 7, 2003, read first time and referred to Committee on Labor and Employment.

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Introduced

First Regular Session 113th General Assembly (2003)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2002 Regular or Special Session of the General Assembly.

## HOUSE BILL No. 1111

A BILL FOR AN ACT to amend the Indiana Code concerning labor and industrial safety.

*Be it enacted by the General Assembly of the State of Indiana:*

- 1 SECTION 1. IC 5-14-3-4, AS AMENDED BY P.L.1-2002,
- 2 SECTION 17, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
- 3 JULY 1, 2003]: Sec. 4. (a) The following public records are excepted
- 4 from section 3 of this chapter and may not be disclosed by a public
- 5 agency, unless access to the records is specifically required by a state
- 6 or federal statute or is ordered by a court under the rules of discovery:
- 7 (1) Those declared confidential by state statute.
- 8 (2) Those declared confidential by rule adopted by a public
- 9 agency under specific authority to classify public records as
- 10 confidential granted to the public agency by statute.
- 11 (3) Those required to be kept confidential by federal law.
- 12 (4) Records containing trade secrets.
- 13 (5) Confidential financial information obtained, upon request,
- 14 from a person. However, this does not include information that is
- 15 filed with or received by a public agency pursuant to state statute.
- 16 (6) Information concerning research, including actual research
- 17 documents, conducted under the auspices of an institution of

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higher education, including information:

(A) concerning any negotiations made with respect to the research; and

(B) received from another party involved in the research.

(7) Grade transcripts and license examination scores obtained as part of a licensure process.

(8) Those declared confidential by or under rules adopted by the supreme court of Indiana.

(9) Patient medical records and charts created by a provider, unless the patient gives written consent under IC 16-39.

(10) Application information declared confidential by the twenty-first century research and technology fund board under IC 4-4-5.1.

(11) The following personal information concerning a customer of a municipally owned utility (as defined in IC 8-1-2-1):

(A) Telephone number.

(B) Social Security number.

(C) Address.

(12) A photograph, a video recording, or an audio recording of an autopsy, except as provided in IC 36-2-14-10.

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

(1) Investigatory records of law enforcement agencies. However, certain law enforcement records must be made available for inspection and copying as provided in section 5 of this chapter.

(2) The work product of an attorney representing, pursuant to state employment or an appointment by a public agency:

(A) a public agency;

(B) the state; or

(C) an individual.

(3) Test questions, scoring keys, and other examination data used in administering a licensing examination, examination for employment, or academic examination before the examination is given or if it is to be given again.

(4) Scores of tests if the person is identified by name and has not consented to the release of his scores.

(5) The following:

(A) Records relating to negotiations between the department of commerce, the Indiana development finance authority, the film commission, the Indiana business modernization and technology corporation, or economic development

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commissions with industrial, research, or commercial prospects, if the records are created while negotiations are in progress.

(B) Notwithstanding clause (A), the terms of the final offer of public financial resources communicated by the department of commerce, the Indiana development finance authority, the Indiana film commission, the Indiana business modernization and technology corporation, or economic development commissions to an industrial, a research, or a commercial prospect shall be available for inspection and copying under section 3 of this chapter after negotiations with that prospect have terminated.

(C) When disclosing a final offer under clause (B), the department of commerce shall certify that the information being disclosed accurately and completely represents the terms of the final offer.

(6) Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

(7) Diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal.

(8) Personnel files of public employees and files of applicants for public employment, except for:

(A) the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;

(B) information relating to the status of any formal charges against the employee; and

(C) information concerning ~~disciplinary actions~~ **findings of fact and decisions** in which final action has been taken and that resulted in the employee being ~~disciplined~~ **suspended without pay** or discharged.

However, all personnel file information shall be made available to the affected employee or his representative. This subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name.

(9) Minutes or records of hospital medical staff meetings.

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(10) Administrative or technical information that would jeopardize a recordkeeping or security system.

(11) Computer programs, computer codes, computer filing systems, and other software that are owned by the public agency or entrusted to it and portions of electronic maps entrusted to a public agency by a utility.

(12) Records specifically prepared for discussion or developed during discussion in an executive session under IC 5-14-1.5-6.1. However, this subdivision does not apply to that information required to be available for inspection and copying under subdivision (8).

(13) The work product of the legislative services agency under personnel rules approved by the legislative council.

(14) The work product of individual members and the partisan staffs of the general assembly.

(15) The identity of a donor of a gift made to a public agency if:

(A) the donor requires nondisclosure of his identity as a condition of making the gift; or

(B) after the gift is made, the donor or a member of the donor's family requests nondisclosure.

(16) Library or archival records:

(A) which can be used to identify any library patron; or

(B) deposited with or acquired by a library upon a condition that the records be disclosed only:

(i) to qualified researchers;

(ii) after the passing of a period of years that is specified in the documents under which the deposit or acquisition is made; or

(iii) after the death of persons specified at the time of the acquisition or deposit.

However, nothing in this subdivision shall limit or affect contracts entered into by the Indiana state library pursuant to IC 4-1-6-8.

(17) The identity of any person who contacts the bureau of motor vehicles concerning the ability of a driver to operate a motor vehicle safely and the medical records and evaluations made by the bureau of motor vehicles staff or members of the driver licensing advisory committee. However, upon written request to the commissioner of the bureau of motor vehicles, the driver must be given copies of the driver's medical records and evaluations that concern the driver.

(18) School safety and security measures, plans, and systems,

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including emergency preparedness plans developed under 511 IAC 6.1-2-2.5.

(c) Notwithstanding section 3 of this chapter, a public agency is not required to create or provide copies of lists of names and addresses, unless the public agency is required to publish such lists and disseminate them to the public pursuant to statute. However, if a public agency has created a list of names and addresses, it must permit a person to inspect and make memoranda abstracts from the lists unless access to the lists is prohibited by law. The following lists of names and addresses may not be disclosed by public agencies to commercial entities for commercial purposes and may not be used by commercial entities for commercial purposes:

- (1) A list of employees of a public agency.
- (2) A list of persons attending conferences or meetings at a state institution of higher education or of persons involved in programs or activities conducted or supervised by the state institution of higher education.
- (3) A list of students who are enrolled in a public school corporation if the governing body of the public school corporation adopts a policy:
  - (A) prohibiting the disclosure of the list to commercial entities for commercial purposes; or
  - (B) specifying the classes or categories of commercial entities to which the list may not be disclosed or by which the list may not be used for commercial purposes.

A policy adopted under subdivision (3) must be uniform and may not discriminate among similarly situated commercial entities.

(d) Nothing contained in subsection (b) shall limit or affect the right of a person to inspect and copy a public record required or directed to be made by any statute or by any rule of a public agency.

(e) Notwithstanding any other law, a public record that is classified as confidential, other than a record concerning an adoption, shall be made available for inspection and copying seventy-five (75) years after the creation of that record.

(f) Notwithstanding subsection (e) and section 7 of this chapter:

- (1) public records subject to IC 5-15 may be destroyed only in accordance with record retention schedules under IC 5-15; or
- (2) public records not subject to IC 5-15 may be destroyed in the ordinary course of business.

SECTION 2. IC 22-5-3-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]: Sec. 1. (a) A person who, after having discharged any employee from his service, prevents the discharged

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employee from obtaining employment with any other person commits a Class C infraction and is liable in penal damages to the discharged employee to be recovered by civil action; but this subsection does not prohibit a person from informing, in writing, any other person to whom the discharged employee has applied for employment a truthful statement of the reasons for the discharge.

(b) An employer that discloses information about a current or former employee is immune from civil liability for the disclosure and the consequences proximately caused by the disclosure, unless it is proven by a preponderance of the evidence that the information disclosed was known to be false at the time the disclosure was made. **The disclosure of information must be made in accordance with IC 22-16-7-1.**

(c) Upon written request by the prospective employee, the prospective employer will provide copies of any written communications from current or former employers that may affect the employee's possibility of employment with the prospective employer. The request must be received by the prospective employer not later than thirty (30) days after the application for employment is made to the prospective employer.

SECTION 3. IC 22-16 IS ADDED TO THE INDIANA CODE AS A **NEW ARTICLE** TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]:

## **ARTICLE 16. EMPLOYEE ACCESS TO PERSONNEL RECORDS**

### **Chapter 1. Definitions**

**Sec. 1. The definitions in this chapter apply throughout this article.**

**Sec. 2. "Employee" means an individual employed or permitted to work or perform any service for remuneration or under any contract of hire, written or oral, express or implied, by an employer in any occupation.**

**Sec. 3. "Employer" means an individual, a partnership, an association, a limited liability company, a corporation, a business trust, the state, or any other governmental agency or political subdivision with at least four (4) employees.**

**Sec. 3. "Personnel record" means a record kept by an employer that identifies the employee, to the extent that the record is used or has been used or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action.**

### **Chapter 2. Personnel Record Content**



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1       Sec. 1. A personnel record must include a record in the  
2 possession of a person, corporation, partnership, or other  
3 association that has a contractual agreement with the employer or  
4 employee to keep or supply a personnel record as provided in this  
5 chapter. A personnel record may not include:

6       (1) Employee references supplied to an employer if the  
7 identity of the person making the reference would be  
8 disclosed.

9       (2) Materials relating to the employer's staff planning with  
10 respect to more than one (1) employee, including salary  
11 increases, management bonus plans, promotions, and job  
12 assignments.

13       (3) Medical reports and records made or obtained by the  
14 employer if the records or reports are available to the  
15 employee from the doctor or medical facility involved.

16       (4) Information of a personal nature about a person other  
17 than the employee if disclosure of the information would  
18 constitute a clearly unwarranted invasion of the other  
19 person's privacy.

20       (5) Information that is kept separately from other records and  
21 that relates to an investigation by the employer under  
22 IC 22-16-3.

23       (6) Records limited to grievance investigations that are kept  
24 separately and are not used for the purposes provided in this  
25 chapter.

26       (7) Records maintained by an educational institution that are  
27 directly related to a student and are considered to be  
28 education records under Title 5, Section 513(a) of the federal  
29 Family Educational Rights and Privacy Act of 1974, 20 U.S.C.  
30 1232g.

31       (8) Records kept by an executive, an administrative, or a  
32 professional employee that are kept in the sole possession of  
33 the maker of the record and are not accessible or shared with  
34 other persons. However, a record concerning an occurrence  
35 or fact about an employee kept under this subdivision may be  
36 entered into a personnel record if entered not more than six  
37 (6) months after the date of the occurrence or the date the fact  
38 becomes known.

39       Sec. 2. (a) An employer shall not gather or keep a record of an  
40 employee's associations, political activities, publications, or  
41 communications of activities outside employment, except if the  
42 information is:





1 (1) submitted in writing; or  
 2 (2) authorized to be kept or gathered in writing;  
 3 by the employee to the employer. This prohibition on records does  
 4 not apply to the activities that occur on the employer's premises or  
 5 during the employee's working hours with that employer and that  
 6 interfere with the performance of the employee's duties or with  
 7 duties of other employees.

8 (b) A record that is kept by the employer as permitted under  
 9 subsection (a) shall be part of the personnel record.

### 10 Chapter 3. Record of Criminal Investigation

11 Sec. 1. (a) If an employer has reasonable cause to believe that an  
 12 employee is engaged in criminal activity that may result in loss or  
 13 damage to the employer's property or disruption of the employer's  
 14 business operation and the employer is engaged in an investigation,  
 15 the employer may keep a separate file of information relating to  
 16 the investigation. Upon completion of the investigation or after two  
 17 (2) years, whichever comes first, the employee shall be notified that  
 18 an investigation was or is being conducted of the suspected  
 19 criminal activity. Upon completion of the investigation, if  
 20 disciplinary action is not taken, the investigative file and all copies  
 21 of the material in the file shall be destroyed.

22 (b) If the employer is a criminal justice agency (as defined in  
 23 IC 5-2-4-1(c)) that is involved in the investigation of an alleged  
 24 criminal activity or the violation of an agency rule by the employee,  
 25 the employer shall maintain a separate confidential file of  
 26 information relating to the investigation. Upon completion of the  
 27 investigation, if disciplinary action is not taken, the employee shall  
 28 be notified that an investigation was conducted. If the investigation  
 29 reveals that the allegations are unfounded or unsubstantiated, or  
 30 if disciplinary action is not taken, the separate file must contain a  
 31 notation of the final disposition of the investigation, and  
 32 information in the file shall not be used in any future consideration  
 33 for promotion, transfer, additional compensation, or disciplinary  
 34 action.

### 35 Chapter 4. Use of Personnel Record in Judicial or 36 Administrative Proceeding

37 Sec. 1. (a) Except as provided by subsections (b) and (c),  
 38 personnel record information that was not included in the  
 39 personnel record but should have been as required by this chapter  
 40 shall not be used by an employer in a judicial or an administrative  
 41 proceeding.

42 (b) Personnel record information that in the opinion of the

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1 judge in a judicial proceeding or in the opinion of the hearing  
2 officer in an administrative proceeding was not intentionally  
3 excluded in the personnel record may be used by the employer in  
4 the judicial or administrative proceeding if the employee agrees or  
5 if the employee has been given a reasonable time to review the  
6 information.

7 (c) Material that should have been included in the personnel  
8 record shall be used at the request of the employee.

9 **Chapter 5. Employee Review of Record**

10 **Sec. 1. (a)** An employer, upon written request that describes the  
11 personnel record, shall provide the employee with an opportunity  
12 periodically to review the employee's personnel record at  
13 reasonable intervals if the employer has a personnel record for that  
14 employee.

15 (b) An employer is not required to provide a review of a  
16 personnel record more than twice in a calendar year or more often  
17 than otherwise provided by law.

18 (c) In addition to reviews provided for in subsections (a) and (b),  
19 an employer must comply with any personnel record review  
20 policies established by a collective bargaining agreement.

21 (d) The review must take place at a location reasonably near the  
22 employee's place of employment and during normally scheduled  
23 hours of employment for the employee. If an employee  
24 demonstrates that the employee is unable to review the personnel  
25 record at the employing unit or at a location reasonably near the  
26 employee's place of employment and during normal office hours,  
27 the employer, upon the employee's written request, shall mail a  
28 copy of the requested record to the employee.

29 (e) If a review during normally scheduled hours of employment  
30 for the employee would require the employee to take time off from  
31 work with that employer, the employer shall provide some other  
32 reasonable time for the review.

33 **Sec. 2. (a)** After the review provided in section 1(a) of this  
34 chapter, an employee may obtain a copy of the information or part  
35 of the information contained in the employee's personnel record.

36 (b) An employer may charge a fee for providing a copy of  
37 information contained in the personnel record. The fee shall be  
38 limited to the actual incremental cost of duplicating the  
39 information.

40 **Chapter 6. Treatment of Disputed Information**

41 **Sec. 1. (a)** If there is a disagreement concerning information  
42 contained in a personnel record, removal or correction of that

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1 information may be mutually agreed upon by the employer and the  
2 employee.

3 (b) If an agreement is not reached, the employee may submit a  
4 written statement explaining the employee's position. The  
5 statement may not exceed five (5) sheets of eight and one-half (8  
6 1/2) by eleven (11) inch paper. The statement shall be included if  
7 the information is divulged to a third party and as long as the  
8 original information is a part of the file.

9 (c) If either the employer or employee knowingly places or  
10 causes to be placed in the personnel record information that is  
11 false, the employer or employee, whichever is appropriate, has a  
12 remedy through legal action to have that information expunged.

### 13 Chapter 7. Release of Personnel Record Information

14 Sec. 1. (a) An employer or former employer shall not divulge a  
15 disciplinary report, letter of reprimand, or other disciplinary  
16 action to a third party, to a party who is not a part of the  
17 employer's organization, or to a party who is not a part of a labor  
18 organization representing the employee without written notice to  
19 the employee as provided in this section.

20 (b) The written notice to the employee must be by first class  
21 mail to the employee's last known address and shall be mailed on  
22 or before the day the information is divulged from the personnel  
23 record.

24 (c) This section does not apply if one (1) of the following occurs:

25 (1) The employee has specifically waived written notice as  
26 part of a written, signed employment application with another  
27 employer.

28 (2) The disclosure is ordered in a legal action or arbitration to  
29 a party in that legal action or arbitration.

30 (3) Information is requested by a government agency as a  
31 result of a claim or complaint by an employee.

32 (d) An employer shall review a personnel record before  
33 releasing information to a third party and, except when the release  
34 is ordered in a legal action or arbitration to a party in that legal  
35 action or arbitration, delete disciplinary reports, letters of  
36 reprimand, or other records of disciplinary action that are more  
37 than four (4) years old.

### 38 Chapter 8. Violations

39 Sec. 1. This chapter shall not be construed to:

40 (1) diminish a right of access to records as provided in  
41 IC 5-14-3 or as otherwise provided by law; or

42 (2) conflict with IC 5-14-3-4(b)(8).

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1       **Sec. 2. If an employer violates this article, an employee may**  
2       **commence an action to compel compliance with this article in the**  
3       **county in which:**

- 4           (1) the employee resides;  
5           (2) the employee is employed; or  
6           (3) the personnel record is maintained.

7       **Sec. 3. The court shall award an employee prevailing in an**  
8       **action under this chapter the following:**

- 9           (1) For a violation of this chapter, actual damages plus costs.  
10          (2) For a willful and knowing violation of this chapter, an  
11          amount equal to the weekly pay of the employee, computed at  
12          the usual and customary rate of pay and the usual and  
13          customary hours worked per week, plus costs, reasonable  
14          attorney's fees, and actual damages.

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